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9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

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12
13 A.J. OLIVER,

14 Plaintiff,

15 vs.

16 SILVER STRAND PLAZA, LLC;
17 REMARK CORPORATION,

18 Defendants.
19

} Case No. 07cv2141 H (NLS)

} **Plaintiff's First Amended**
} **Complaint**

I. SUMMARY

1. This is a civil rights action by plaintiff A.J. Oliver (“Oliver”) for discrimination at the building, structure, facility, complex, property, land, development, and/or surrounding business complex known as:

Circle H Liquor
600 Palm Avenue, Suite 113
Imperial Beach, CA 91932
(hereafter “the Store”)

2. Oliver seeks damages, injunctive and declaratory relief, attorneys’ fees and costs, against Silver Strand Plaza, LLC and Remark Corporation (collectively “Circle H Liquor”) pursuant to the Americans with Disabilities Act of 1990, (42 U.S.C. §§ 12101 et seq.), and related California statutes.

II. JURISDICTION

3. This Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343 for ADA claims.

4. Supplemental jurisdiction for claims brought under parallel California law—arising from the same nucleus of operative facts—is predicated on 28 U.S.C. § 1367.

5. Oliver’s claims are authorized by 28 U.S.C. §§ 2201 and 2202.

III. VENUE

6. All actions complained of herein take place within the jurisdiction of the United States District Court, Southern District of California, and venue is invoked pursuant to 28 U.S.C. § 1391(b), (c).

IV. PARTIES

7. Circle H Liquor owns, operates, or leases the Store, and consists of a person (or persons), firm, or corporation.

8. Oliver suffered a stroke approximately 13 years ago. The stroke left him paralyzed, speech impaired, and unable to stand or walk. He requires the use

1 of a motorized wheelchair when traveling about in public. Consequently, Oliver
2 is “physically disabled,” as defined by all applicable California and United States
3 laws, and a member of the public whose rights are protected by these laws.

4 V. FACTS

5 9. The Store is a sales or retail establishment, open to the public,
6 which is intended for nonresidential use and whose operation affects commerce.

7 10. Oliver visited the Store and encountered barriers (both physical and
8 intangible) that interfered with—if not outright denied—his ability to use and
9 enjoy the goods, services, privileges, and accommodations offered at the facility.
10 To the extent known by Oliver, the barriers at the Circle H Liquor included, but
11 are not limited to, the following:

- 12 • The tow away signage posted is incorrect;
- 13 • The tow away signage posted does not include a phone number;
- 14 • There is no parking spaces designated as being accessible to the disabled;
- 15 • There is no parking spaces designated as being “van accessible;” and,
- 16 • There is a ramp encroaching into the access aisle provided.

17 These barriers prevented Oliver from enjoying full and equal access.

18 11. Oliver was also deterred from visiting the Store because he knew
19 that the Store’s goods, services, facilities, privileges, advantages, and
20 accommodations were unavailable to physically disabled patrons (such as
21 himself). He continues to be deterred from visiting the Store because of the future
22 threats of injury created by these barriers.

23 12. Oliver also encountered barriers at the Store, which violate state and
24 federal law, but were unrelated to his disability. Nothing within this complaint,
25 however, should be construed as an allegation that Oliver is seeking to remove
26 barriers unrelated to his disability.

27 13. Circle H Liquor knew that these elements and areas of the Store
28 were inaccessible, violate state and federal law, and interfere with (or deny)

1 access to the physically disabled. Moreover, Circle H Liquor has the financial
2 resources to remove these barriers from the Store (without much difficulty or
3 expense), and make the facility accessible to the physically disabled. To date,
4 however, Circle H Liquor refuses to either remove those barriers or seek an
5 unreasonable hardship exemption to excuse non-compliance.

6 14. At all relevant times, Circle H Liquor has possessed and enjoyed
7 sufficient control and authority to modify the subject property to remove
8 impediments to wheelchair access and to comply with the Americans with
9 Disabilities Act Accessibility Guidelines and Title 24 regulations. Circle H
10 Liquor has not removed such impediments and have not modified the subject
11 property to conform to accessibility standards. Circle H Liquor has intentionally
12 maintained the subject property in its current condition and has intentionally
13 refrained from altering the subject property so that it complies with the
14 accessibility standards.

15 15. Oliver further alleges that the (continued) presence of barriers at the
16 facility is so obvious as to establish Circle H Liquor's discriminatory intent.¹ On
17 information and belief, Oliver avers that evidence of this discriminatory intent
18 includes Circle H Liquor's refusal to adhere to relevant building standards;
19 disregard for the building plans and permits issued for the facility; conscientious
20 decision to the architectural layout (as it currently exists) at the facility; decision
21 not to remove barriers from the facility; and allowance that Circle H Liquor's
22 property continues to exist in its non-compliant state. Oliver further alleges, on
23 information and belief, that Circle H Liquor is not in the midst of a remodel, and
24 that the barriers present at the facility are not isolated (or temporary) interruptions
25 in access due to maintenance or repairs.²

26 VI. FIRST CLAIM

27
28 ¹ E.g., *Gunther v. Lin*, 144 Cal.App.4th 223, fn. 6

² Id.; 28 C.F.R. § 36.211(b)

Americans with Disabilities Act of 1990

Denial of “Full and Equal” Enjoyment and Use

16. Oliver incorporates the allegations contained in paragraphs 1 through 15 for this claim.

17. Title III of the ADA holds as a “general rule” that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment (or use) of goods, services, facilities, privileges, and accommodations offered by any person who owns, operates, or leases a place of public accommodation. 42 U.S.C. § 12182(a).

18. Circle H Liquor discriminated against Oliver by denying “full and equal enjoyment” and use of the goods, services, facilities, privileges or accommodations of the Store during each visit and each incident of deterrence.

Failure to Remove Architectural Barriers in an Existing Facility

19. The ADA specifically prohibits failing to remove architectural barriers, which are structural in nature, in existing facilities where such removal is readily achievable. 42 U.S.C. § 12182(b)(2)(A)(iv). The term “readily achievable” is defined as “easily accomplishable and able to be carried out without much difficulty or expense.” *Id.* § 12181(9).

20. When an entity can demonstrate that removal of a barrier is not readily achievable, a failure to make goods, services, facilities, or accommodations available through alternative methods is also specifically prohibited if these methods are readily achievable. *Id.* § 12182(b)(2)(A)(v).

21. Here, Oliver alleges that Circle H Liquor can easily remove the architectural barriers at the Store without much difficulty or expense, and that Circle H Liquor violated the ADA by failing to remove those barriers, when it was readily achievable to do so.

22. In the alternative, if it was not “readily achievable” for Circle H Liquor to remove the Store’s barriers, then Circle H Liquor violated the ADA by

1 failing to make the required services available through alternative methods,
2 which are readily achievable.

3 Failure to Design and Construct an Accessible Facility

4 23. On information and belief, the Store was designed or constructed (or
5 both) after January 26, 1992—independently triggering access requirements
6 under Title III of the ADA.

7 24. The ADA also prohibits designing and constructing facilities for first
8 occupancy after January 26, 1993, that aren't readily accessible to, and usable by,
9 individuals with disabilities when it was structurally practicable to do so. 42
10 U.S.C. § 12183(a)(1).

11 25. Here, Circle H Liquor violated the ADA by designing or
12 constructing (or both) the Store in a manner that was not readily accessible to the
13 physically disabled public—including Oliver—when it was structurally practical
14 to do so.³

15 Failure to Make an Altered Facility Accessible

16 26. On information and belief, the Store was modified after January 26,
17 1992, independently triggering access requirements under the ADA.

18 27. The ADA also requires that facilities altered in a manner that affects
19 (or could affect) its usability must be made readily accessible to individuals with
20 disabilities to the maximum extent feasible. 42 U.S.C. § 12183(a)(2). Altering an
21 area that contains a facility's primary function also requires adding making the
22 paths of travel, bathrooms, telephones, and drinking fountains serving that area
23 accessible to the maximum extent feasible. Id.

24 28. Here, Circle H Liquor altered the Store in a manner that violated the
25 ADA and was not readily accessible to the physically disabled public—including
26 Oliver—to the maximum extent feasible.

27
28 ³ Nothing within this Complaint should be construed as an allegation that plaintiff is bringing this action
as a private attorney general under either state or federal statutes.

1 Failure to Modify Existing Policies and Procedures

2 29. The ADA also requires reasonable modifications in policies,
3 practices, or procedures, when necessary to afford such goods, services, facilities,
4 or accommodations to individuals with disabilities, unless the entity can
5 demonstrate that making such modifications would fundamentally alter their
6 nature. 42 U.S.C. § 12182(b)(2)(A)(ii).

7 30. Here, Circle H Liquor violated the ADA by failing to make
8 reasonable modifications in policies, practices, or procedures at the Store, when
9 these modifications were necessary to afford (and would not fundamentally alter
10 the nature of) these goods, services, facilities, or accommodations.

11 31. Oliver seeks all relief available under the ADA (*i.e.*, injunctive
12 relief, attorney fees, costs, legal expense) for these aforementioned violations. 42
13 U.S.C. § 12205.

14 32. Oliver also seeks a finding from this Court (*i.e.*, declaratory relief)
15 that Circle H Liquor violated the ADA in order to pursue damages under
16 California's Unruh Civil Rights Act or Disabled Persons Act.

17 VII. SECOND CLAIM

18 **Disabled Persons Act**

19 33. Oliver incorporates the allegations contained in paragraphs 1
20 through 30 for this claim.

21 34. California Civil Code § 54 states, in part, that: Individuals with
22 disabilities have the same right as the general public to the full and free use of the
23 streets, sidewalks, walkways, public buildings and facilities, and other public
24 places.

25 35. California Civil Code § 54.1 also states, in part, that: Individuals
26 with disabilities shall be entitled to full and equal access to accommodations,
27 facilities, telephone facilities, places of public accommodation, and other places
28 to which the general public is invited.

36. Both sections specifically incorporate (by reference) an individual's rights under the ADA. See Civil Code §§ 54(c) and 54.1(d).

37. Here, Circle H Liquor discriminated against the physically disabled public—including Oliver—by denying them full and equal access to the Store. Circle H Liquor also violated Oliver’s rights under the ADA, and, therefore, infringed upon or violated (or both) Oliver’s rights under the Disabled Persons Act.

38. For each offense of the Disabled Persons Act, Oliver seeks actual damages (both general and special damages), statutory minimum damages of one thousand dollars (\$1,000), declaratory relief, and any other remedy available under California Civil Code § 54.3.

39. He also seeks to enjoin Circle H Liquor from violating the Disabled Persons Act (and ADA) under California Civil Code § 55, and to recover reasonable attorneys' fees and incurred under California Civil Code §§ 54.3 and 55.

VIII. THIRD CLAIM

Unruh Civil Rights Act

40. Oliver incorporates the allegations contained in paragraphs 1 through 30 for this claim.

41. California Civil Code § 51 states, in part, that: All persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

42. California Civil Code § 51.5 also states, in part, that: No business establishment of any kind whatsoever shall discriminate against any person in this state because of the disability of the person.

43. California Civil Code § 51(f) specifically incorporates (by reference) an individual's rights under the ADA into the Unruh Act.

44. Circle H Liquor's aforementioned acts and omissions denied the physically disabled public—including Oliver—full and equal accommodations, advantages, facilities, privileges and services in a business establishment (because of their physical disability).

45. These acts and omissions (including the ones that violate the ADA) denied, aided or incited a denial, or discriminated against Oliver by violating the Unruh Act.

46. Oliver was damaged by Circle H Liquor's wrongful conduct, and seeks statutory minimum damages of four thousand dollars (\$4,000) for each offense.

47. Oliver also seeks to enjoin Circle H Liquor from violating the Unruh Act (and ADA), and recover reasonable attorneys' fees and costs incurred under California Civil Code § 52(a).

IX. FOURTH CLAIM

Denial of Full and Equal Access to Public Facilities

48. Oliver incorporates the allegations contained in paragraphs 1 through 13 for this claim.

49. Health and Safety Code § 19955(a) states, in part, that: California public accommodations or facilities (built with private funds) shall adhere to the provisions of Government Code § 4450.

50. Health and Safety Code § 19959 states, in part, that: Every existing (non-exempt) public accommodation constructed prior to July 1, 1970, which is altered or structurally repaired, is required to comply with this chapter.

51. Oliver alleges the Store is a public accommodation constructed, altered, or repaired in a manner that violates Part 5.5 of the Health and Safety Code or Government Code § 4450 (or both), and that the Store was not exempt under Health and Safety Code § 19956.

1 52. Circle H Liquor' non-compliance with these requirements at the
2 Store aggrieved (or potentially aggrieved) Oliver and other persons with physical
3 disabilities. Accordingly, he seeks injunctive relief and attorney fees pursuant to
4 Health and Safety Code § 19953.

5 X. PRAYER FOR RELIEF

6 WHEREFORE, Oliver prays judgment against Circle H Liquor for:

- 7 1. Injunctive relief, preventive relief, or any other relief the Court deems
8 proper.
- 9 2. Declaratory relief that Circle H Liquor violated the ADA for the purposes
10 of Unruh Act or Disabled Persons Act damages.
- 11 3. Statutory minimum damages under either sections 52(a) or 54.3(a) of the
12 California Civil Code (but not both) according to proof.
- 13 4. Attorneys' fees, litigation expenses, and costs of suit.⁴
- 14 5. Interest at the legal rate from the date of the filing of this action.

15
16 DATED: January 31, 2008

LAW OFFICES OF LYNN HUBBARD

17
18 /s/ Lynn Hubbard, III, Esquire

19 LYNN HUBBARD, III

20 Attorney for Plaintiff
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⁴ This includes attorneys' fees under California Code of Civil Procedure § 1021.5.
Oliver v. Silver Strand Plaza, LLC, et al.
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